87-353

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Reather P. Arnold,
Petitioner,

v.

South Carolina Public
Service Authority,
Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA SUPREME COURT

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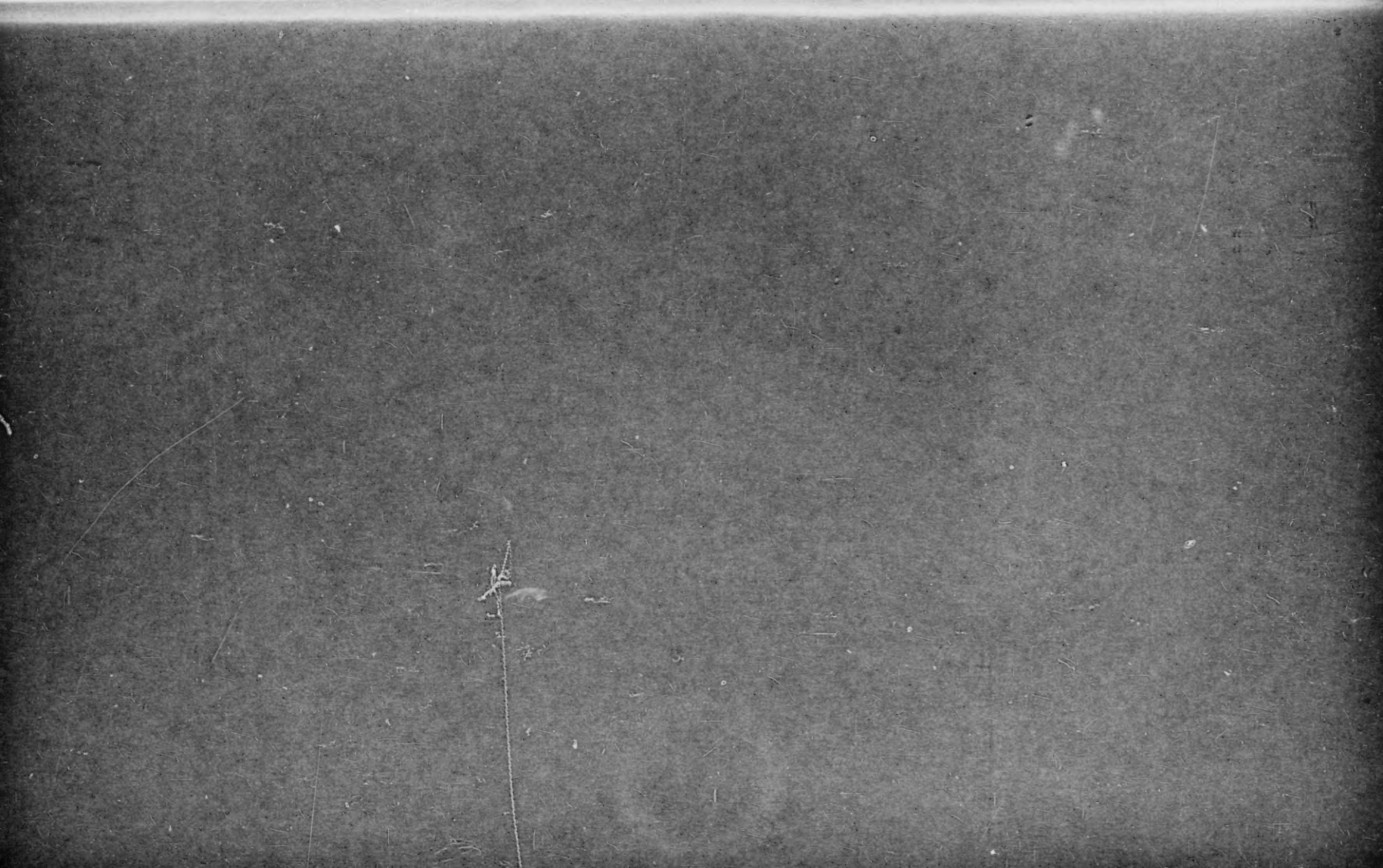

QUESTION PRESENTED

IS IT A VIOLATION OF THE CONSTITUTIONAL OBLIGATION TO PAY "JUST COMPENSATION," TO HOLD THAT THE VALUE OF PROPERTY TAKEN IN CONDEMNATION CANNOT BE VALUED IN COMBINATION WITH ADJOINING LANDS WITHOUT UNITY OF OWNERSHIP?

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TABLE OF AUTHORITIES

Statutes

28 USC §1257(3).
40 USC §258(a) - 258(e).
§28-5-90 Code of Laws of South Carolina (1976).

Rules

Rule 17.1 17.1(b) and 21.1(h) Rules of the Supreme Court of the United States

Cases

Arnold v. South Carolina Public Service Authority, _____ S.C. _____, 356 S.E.2d 837 (1987).
Barnes v. North Carolina State Highway Commission, 250 N.C. 387, 109 S.E.2d 219 (1959).
Henner v. State, 224 N.Y.S.2d 420, 32 Misc.2d 333, (1962).
Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed. 527 (1983)
Lewis v. South Carolina Highway Department, 278 S.C. 170, 293 S.E.2d 434 (1982).
Nantala Power & Light Company v. Moss, 220 N.C. 200, 17 S.E.2d 10 (1941)
Olson v. United States, 292 U.S. 54 S.Ct. 704 (1937).
Sharpe v. United States, 191 U.S. 341, 24 S.Ct. 114, 48 L.Ed. 211 (1903).
South Carolina Highway Department v. Terrain, Inc., 276 S.C. 186, 227 S.E.2d 184 (1976).
South Carolina Public Service Authority v.

Reather P. Arnold, et. al., 287 S.C. 584, 340 S.E.2d 535 (1985).

State v. Dugan, et. al., 277 S.C. 35, 282 S.E.2d 838 (1981).
State Highway Commission v. Fortune, 91 N.W.2d 675, 77 S.D. 302 (1958).
Tyson v. State Highway Commission, 249 N.C. 732, 107 S.E.2d 630 (1959).
United States v. Dow, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958).
United States v. Runner, 174 F.2d 651 (10th Cir. 1949).
United States v. 2979.72 Acres, 270 F.2d 707 (4th Cir.
(1959).
United States v. 1532.63 Acres of Land, 86 F.Supp 467 (D.S.C. 1949).
United States v. 33.90 Acres of Land, 709 F.2d 1012 (5th Cir. 1983).

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South Carolina Public Service Authority, Respondent, prays that the Petition for Writ of Certiorari filed in the herein referenced case be denied on jurisdictional as well as substantive grounds.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this court under 28 U.S.C. §1257(3) which provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court.... (3) ... where any title, right, privilege, or immunity is specially set up or claimed under the constitution, treaties or statutes of. . . the United States.

28 U.S.C. §1257(3). (emphasis added).

The "final judgement" presented by the petitioner here for review is that the South Carolina Supreme Court's holding in Arnold v. South Carolina Public Service Authority, _____ S.C. _____ 356, S.E.2d 837 (1987, S.C.) violates the constitutional obligation to pay just compensation for lands taken in eminent domain proceedings. The petitioner argues that to hold that the value of property taken in condemnation cannot be valued in combination with adjourning lands without unity of ownership is unconstitutional. This constitutional

claim was never raised or decided in any of the South Carolina court proceedings. Thus, there is no "final judgement" rendered by the highest South Carolina court on this constitutional issue from which any appeal can lie. The exceptions taken by the petitioner (Appendix A) and the question presented by the petitioner (Appendix B) in the proceeding before the South Carolina Supreme Court raises no constitutional issue.

> A review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor....

Rule 17.1, Rules of the Supreme Court of the United States.

The function of a Writ of Certiorari by the United States Supreme Court is to correct substantial errors of law which are not otherwise reviewable, and involve a federal question. Here there is no federal question that has been reviewed by the South Carolina courts. Rule 17.1(b). Id. The decision sought to be reviewed here is one merely involving the formula or method by which land values may be determined in condemnation proceedings. This question involves no constitutional issue; none was ever presented to any South Carolina court; and none was decided by any South Carolina court. Where federal questions are not raised and passed on in the State courts, the U. S. Supreme Court will not consider the issue. Moreover, if both of the requirements that a federal

question has been raised and decided in the State court below do not appear on the record, the appellant jurisdiction of the Supreme Court fails. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983). Finally, Rule 21.1(h), Rules of the Supreme Court of the Unites States, provides that if review of the judgment of a state court is sought, the statement of the case should specify the stages in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way in which they were passed upon by the court. The statement of the case in the Petition for the Writ herein does not comply with Rule 21.1(h). Thus, there is no jurisdictional basis for review in this case and the petition must be denied.

STATEMENT OF THE FACTS

This is a condemnation action, which was originally instituted by the South Carolina Public Service Authority for the purpose of establishing a powerline easement.

The petitioner and five (5) of her siblings own six (6) contiguous tracts of land that are all crossed by respondent's powerline. Approximately 6-8 months after entry by the condemnor, the family members began investigating to determine if minable limestone existed on their properties. They discovered and it is undisputed that no one tract alone could economically support any limestone mining. The parties and the testimony were also in dispute regarding whether the six (6) tracts grouped together could establish an economically feasible

quarry site[1] and whether the tracts could be combined for the purpose of establishing the limestone mining as the highest and best use and thereby greater damages for the property.

The trial court excluded any evidence concerning combining the six tracts and this ruling was upheld by the South Carolina Supreme Court. Arnold v. S. C. Public Service Authority, supra. (1987, S.C.).

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[1] Respondent disputes petitioner's assertion that the parties agree on the combined tract being able to economically support a limestone mining site. (Petitioner's Petition at page 8.)

REASON FOR DENYING THE WRIT

Petitioner asserts that the disallowance of unification of separate and independent tracts in a condemnation proceeding violates the Fifth Amendment to the Constitution. There is no challenge regarding the underlying right to compensation. The focus here is on the method of valuation alone.

In South Carolina the law has been established for years which generally requires the unity of ownership and use, as well as physical continuity, in order for parcels to be united for the purpose of awarding damages. S.C. Hwy. Dept. v. Terrain, Inc., 276 S.C. 186, 227 S.E.2d 184 (1976). Lewis v. S.C. Hwy. Dept., 278 S.C. 170, 293 S.E.2d 434, 435 (1982).

In the Terrain case, supra, the S. C. Supreme Court held that only where parcels of land are united in ownership, physical proximity and use may a court hold

that several contiguous, but independently acquired, parcels of land constitute a single tract. Terrain, supra, 227 S.E.2d at 187; Barnes v. North Carolina State Highway Commission, 250 N.C. 387, 109 S.E.2d 219 (1959).

Moreover, in deciding the Terrain case, supra, the South Carolina Supreme Court adopted the holding in Barnes v. North Carolina State Highway Commission, supra. In Barnes the same question presently was decided by the North Carolina Supreme Court as follows:

> The parcels claimed as a single tract must be owned by the same party or parties.... Tyson v. State Highway Commission, 249 N.C. 732, 107 S.E.2d 630 ... different owners of adjoining parcels may not unite them as one tract, nor may an owner of one tract unite with his land adjoining tracts of other owners for the purpose of showing thereby greater

> damages. Nantala Power & Light Co. v. Moss, 220 N.C. 200, at 207, 17 S.E.2d 10 (1941).

Barnes v. North Carolina, 109 S.E.2d at 225. The court in Terrain, supra, applied the same principles as the North Carolina court in Barnes.

The holding of the S.C. Supreme Court here also follows that of the United States Supreme Court's decision in U.S. v. Dow, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958). In Dow the United States acquired a pipeline easement over Dow's property, a 617-acre tract, pursuant to the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. §258(a)-258(c), 40 USCA §§258(a)-258(e).[2]

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[2] Section 1 of the Declaration of Taking Act is identical to the Public Works Eminent Domain Statute, §28-5-90 Code of Laws of South Carolina (1976), involved in the present case, which provides: "Upon the filing of said declaration of taking and of the deposit in the court ... of the estimated compensation ... title ... shall

In the Dow case, supra, the United States filed its Petition in Condemnation in 1943 and immediately took possession of the land. In 1945 Mr. Dow purchased the property, and subsequently, in 1946, the government filed its Declaration of Taking and deposited into the court the estimated compensation. Dow claimed the right to the compensation as "owner," but the U.S. Supreme Court held that the owner at the time the government took possession in 1943 was the one entitled to receive payment.

The U. S. Supreme Court reasoned that the time of filing cannot ever be the time of taking where the government has already taken possession and, in dicta,

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vest in the United States ... and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation ... shall vest in the persons entitled thereto ...."

ruled that unification after entry by a condemnor cannot be had because:

> Manipulations might be encouraged which could operate to the disadvantage of either the landowner or the United States.... For instance, if a single tract of land were worth more than the sum of its component parcels, cf. United States v. Runner, 10 Cir. 174 F.2d 651, owners of adjacent condemned properties could consolidate their holdings after the governments' entry solely for the purpose of obtaining a larger award.
> We cannot attribute to Congress the intention to promulgate a rule which would open the door to such obvious incongruities and undesirable possibilities.

U.S. v. Dow, supra, 357 U.S. at 25.

The Fourth Circuit has also followed this reasoning in U.S. v. 2979.72 Acres, 270 F.2d 707 at 713 (4th Cir. 1959), where the court stated:

It is also generally held that tracts vested in different persons cannot be considered as a whole although used as one. United States v. Miller, 1943, 317 U.S. 369, 375-376, 63 S. Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55; Bauman v. Ross, 1897, 167 U.S. 548, 574, 17 S. Ct. 966, 42 L.Ed. 270; United States v. Grizzard, 1911, 219 U.S. 180, 184-185, 31 S. Ct. 162, 55 L.Ed. 165, 31 L.R.A.,N.A.S. 1135; Baetjer v. United States, 1 Cir. 1944, 143 F.2d 391, 394-395, certiorari denied, 323 U.S. 772, 65 S. Ct. 131, 89 L.Ed. 618; United States v. Honolulu Plantation Co., 9 Cir. 1950, 182 F.2d 172, 176-179, certiorari denied, 1950, 340 U.S. 820, 71 S. Ct. 51, 95 L.Ed. 602; United States v. Mills, 8 Cir. 1956, 237 F.2d 401; 6 A.L.R.2d 1197; Cole Investment Co. v. United States, 9 Cir. 1958, 258 F.2d 203; McIntyre v. Board of County Com'rs, 1959, 168 Kan. 115, 211 P.2d 59; 18 Am.Jur.,

Eminent Domain, §272, p. 912.

Finally, the mere fact that owners of contiguous properties are related by blood or marriage is insufficient as a matter of law to allow the court to consider the properties as one parcel. In State Highway Commission v. Fortune, 91 N.W.2d 675, 77 S.D. 302 (1958), the court held where land which was the subject of condemnation proceedings was operated by a father and his son as a single ranch unit, but consisted of parcels owned separately by either the father or the son, that damages could not be awarded on a basis that the land constituted one parcel, due to the lack of unity in ownership of the parcels. Also, in Henner v. State, 224 N.Y.S.2d 420, 32 Misc.2d 333, (1962), the court held that although a husband and wife were tenants by entirety, in a parcel contiguous to an appropriated parcel owned by the wife alone,

and where both parcels were used jointly for a common purpose, any right of the wife for damages to the contiguous parcel could not benefit the husband.

In Olson v. United States, 292 U.S. 246, 54 S. Ct. 704 (1937), the facts are vastly distinguishable. The holding in Olson, if applicable, supports the condemnor's assertions in this appeal. In Olson, the landowner sought to increase the value of his property taken by having its value and use measured by the value of the parcel to the condemning authority when combined with the other parcels taken by the authority. The quote from the Olson opinion offered by the petitioner is taken out of context in that the issue there involved whether it was appropriate for the owner to be compensated for value to the parcel resulting from the take and usage to be implemented by the authority. The court held:

> The value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking.

Olson, supra, 54 S. Ct. at 709.

> As just compensation includes no increment resulting from the taking, . . . on the facts shown, it conclusively appears that there was no element of value belonging to petitioners that legitimately could be attributed to use and adaptability of their lands for reservoir purposes. The evidence covered by petitioners' offers was inadmissible. The court rightly excluded reservoir uses from consideration.

Olson, supra, 54 S. Ct. at 711.

The South Carolina Court here held that the individually owned tracts could not be united to establish a different, highest and best use and thereby

greater damages from the highest and best use of the individual parcels. The attempt by petitioner is precisely to unify the six (6) individually owned tracts into one large tract for the purpose of increasing damages, which was disallowed in Lewis v. SCHD, 278 S.C. 170, 293 S.E.2d 434 (1982) and SCHD v. Terrain, Inc., 276 S.C. 186, 227 S.E.2d 184 (1976).

CONCLUSION

Inasmuch as the jurisdictional requirements for the granting of a petition for Writ of Certiorari have not been presented by the petitioner, and because there is no federal question wrongly decided

by the South Carolina Supreme Court in this case, the petition should be denied.

Respectfully submitted,

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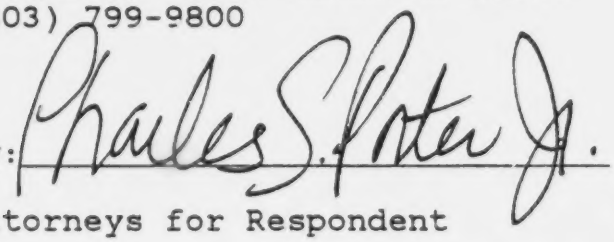
By: 

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